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Bartleby's Preference: Res Ipsa Loquitur

Matthew Guillen

I muse upon my country's ills-
The Tempest bursting from the waste of Time
On the world's fairest hope linked with man's
foulest crime.[1]

1 Herman Melville's short story, "Bartleby the Scrivener: A Story of Wall Street", published in late 1853, involves a law clerk whose job profile - that of "scrivener"- in reality comprised a wide range of menial writing assignments: from the standardized drawing up of bills, bonds, deeds, leases, etc. to the mechanical copying of documents.[2] Compared to the others, Bartleby is described by the lawyer narrator as the model employee: "His steadiness, his freedom from all dissipation, his incessant industry [...], his great stillness, his unalterableness of demeanor under all circumstances, made him a valuable acquisition."(41) This, even after the scrivener has begun stating his "preference" not to perform certain tasks - thus maneuvering the lawyer, after weighing the costs against the benefits of such an arrangement, into contriving for himself a satisfactory, since overall financially convenient, resignation: "[I]t was exceedingly difficult to bear in mind all the time those strange peculiarities, privileges, and unheard-of exemptions, forming the tacit stipulations on Bartleby's part under which he remained in my office." (42)

2 For our purposes, one observation is particularly apt. In "'Bartleby the Scrivener,' Poe, and the Duyckinck Circle" Daniel Wells unravels Melville's and Poe's relationships to Evert Duyckinck who, along with his brother, edited *The Literary World* and contributed to what has come to be known as the Knickerbocker convention of New York writing. Wells takes care to distinguish Melville and Edgar Allan Poe, to whose style "Bartleby" had been likened in a note in *The Literary World's* column of "Literature, Books of the Week, Etc."--mentioning the story as a "Poeish tale"[3]--adding that although both writers can make a reader feel and share the desperate loneliness of a man, whether he be a "man of the crowd" or a Bartleby, the latter's loneliness has no terror in it but rather "disciplined dignity."[4]

3 It will be suggested that elements of Wells' notion of "disciplined dignity" are controlling throughout the story, but to conflicting ends depending on the professional canon: in the case of the narrator, discipline and dignity bind one to the letter of the law; in the case of the artist, these traits release the pen beyond the four corners of the page, and the world, beyond marginalia, into the unspeakable--or, resting within legal terminology, *res ipsa loquitur*--"the thing speaks for itself".

4 In current legal usage, this notion occurs in cases involving the liability of manufacturers for defects in the products they sell. The underlying notion of "the self-explanatory" has the practical effect of not requiring an injured plaintiff to spend a fortune hiring engineers to perform sophisticated laboratory testing in order to prove that his automobile tires would not have exploded after two weeks of ordinary driving but for negligence on the part of the manufacturer. This notion translates into a reduction of legal cost and, most significantly, paperwork--the literary equivalent being silence on subjects which lengthy articulation might render less powerful.

5 As such, after his retreat into silence, Melville's job as customs inspector may be said to have constituted a Zen-like hovering above the real, described by R.H. Stoddard as "an asylum for nonentities"[5], an observation in keeping with Mumford's biographical correspondences between Melville, whose personal life teemed with members of the legal profession, and the scrivener:

> By his persistence in minding his own spiritual affairs, those who might have helped him on their own terms, like Allan [Melville's lawyer brother] or his father-in-law [Lemuel Shaw] or his Uncle Peter [Gansevoort], inevitably became a little impatient; for in the end, they foresaw they would be obliged to throw him off, and he would find himself in prison, not in the visible prison for restraining criminals, but in the pervasive prison of dull routine and meaningless activity.[6]

A. The Lawyer

6 The lawyer who narrates "Bartleby", "a rather elderly man," considers his multiple contacts with scriveners, whose "divers histories" might make "good natured gentlemen smile" and "sentimental souls weep," a part of his avocation. From the beginning he appears to be a disinterested observer who collects the eccentric stories of clerical laborers. Bartleby is a prize specimen in his collection, since the lawyer alone through personal observation knows what little is ascertainable about Bartleby.

7 Nicolas Ayo suggests that the lawyer's attitude toward his several employees appears to be almost entirely utilitarian. He keeps them to the extent they prove useful to him. Nipper suffers under the mechanical and thoughtless routine of a human copy-machine. Muscle tension makes him irritable, and the six-day week compounds his difficulty. His employer, however, judges Nippers to be too "ambitious." Similarly, after giving a coat to Turkey to make his appearance more presentable for business reasons, he concludes that new clothes breed only "insolence." Turkey becomes "a man whom prosperity harmed." Ginger Nut, the office boy of twelve years of age, works for a dollar a week, and the drawer to his desk is not considered private. Upon acquiring more business, the lawyer determines, "not only must I push the clerks already with me, but I must have additional help" (23). In short, "the employer seems exclusively productivity-minded and quite willing to manipulate and exploit his employees for his own ends, according to a business-is-business ethic."[7] This portrayal is much in keeping with the prevailing

consensus of the day concerning the legal profession's ethically dubious practices. As stated by David Dudley Field, referring to the State of New York:

> What, then, is to be said of the lawyers? [...] English literature from time immemorial has teemed with scoffs at attorneys: on the stage they have always been represented as fraudulent tricksters; Dickens has made Dodson and Fogg immortal as types of experts in chicane; and in our state, so long ago as 1818, a statute was passed indirectly imputing to lawyers the practice of buying claims with intent to bring suits upon them, and prohibiting such purchases in future.[8]

8 Sculley Bradley argues that, on the contrary, the narrator constitutes an exception to the rule--demonstrated by his being won over to Bartleby's side : "the gradual unfolding of the lawyer's human understanding, responding to Bartleby's passive resistance against all that he is or serves, until he is on Bartleby's side--this theme is perhaps central."[9] And Leo Marx proposes that at the end in the Tombs, where life, in terms of sky and earth, can still be appreciated, grace is given only to the lawyer--who alone is "aware of the grass and to whom, therefore, the meaning is finally granted." [10]

9 However, should biographical correspondences hold, a particularly benign portrayal of a New York lawyer would evidence a rupture with received tradition. The fact remains that the New York legal community was rife with scandal throughout the nineteenth century, prompting Thomas Shearman to write on the topic of lawyers keeping for themselves bribes their clients had entrusted them to "satisfy the judge" thereby ensuring their "share of the public plunder":

> It can scarcely be necessary to point out the demoralizing effect of judicial corruption upon the criminal classes of society. They learn to rely upon the profits of their depredations for immunity; and when justice finally overtakes them, the predominant conviction of their minds is that they are only punished because their money was not enough to satisfy the judge. [...] Many of them have paid the required bribe to their "lawyer," who has never troubled himself to offer it to the judge; and such men naturally go to prison with hearts full of rage and suspicion, not knowing whom to blame, and therefore cursing the whole world [...] the process which is now going on debauches the public conscience almost as much as it robs the public purse. Every successive reaction is fainter. Efforts were made in 1853, 1857, 1863, and 1865 to stem the current, and each time with less energy, less unity, and less effect. Even the most respectable classes are growing callous. They are satisfied that corruption is inevitable, and in many instances are only anxious that their party should have its share of the public plunder... [11]

10 The narrator is a former Master of the New York Court of Chancery--a post which, at the moment of narration, has ceased to exist but which the lawyer presumably still occupied at the time the events surrounding his scrivener unfolded. The name derives from the Court of the Lord Chancellor in England, the highest court of judicature next to the House of Lords.[12] Originally, this Court consisted of two tribunals, one of which dealt with the issuance of Parliamentary and Common Law writs, the second of which proceeded upon rules of equity and conscience, hence moderating the severity of the Common Law, and giving relief in cases where there was no remedy in the other court--the equivalent of a modern-day Court of Appeals. In America, Courts of Chancery dealt exclusively with equity issues and were set up to protect natural rights against strict adherence to the written law. As Master, Bartleby's employer would have had to decide each case expediently, collecting fees regardless of the outcome. The potential for abuse was evident, and in many cases, lengthy litigation kept property from being transferred to its rightful heirs.

11 The narrator's anger, which he seldom indulges "in dangerous indignation at wrongs and outrages," is vented upon the supposedly unjust repeal of this outdated sinecure, whose profits he had counted upon for a "life-lease." The new State Constitution, which abolished the chancery office, is judged to have acted with a "sudden and violent abrogation,"--inappropriate invectives, issuing from a respectable lawyer, for democratic constitutional changes. Apparently he had received the appointment of Master in Chancery not long before hiring Bartleby, and the new man was to assist his two copyists in the work of his added responsibilities. Courts of chancery, however, had in fact come to be perceived as aristocratic and patriarchal, and were abolished in New York with the adoption of a new constitution in 1846, and a new field code in 1848--the year of the death of John Jacob Astor--a man whose name "rings like unto bullion" for the narrator: [13]

> The late John Jacob Astor, a personage little given to poetic enthusiasm, had no hesitation in pronouncing my first grand point to be prudence; my next, method. I do not speak it in vanity, but simply record the fact, that I was not unemployed in my profession by the late John Jacob Astor; a name which, I admit, I love to repeat, for it hath a rounded and orbicular sound to it, and rings like unto bullion. I will freely add, that I was not insensible to the late John Jacob Astor's good opinion.

12 The lawyer's complaint would thus have held topical interest for Melville's first readers. So would, perhaps, the fact that courts of chancery had served Astor well in his real estate dealings, especially in the frequent mortgage foreclosures of the later period of his life.[14] His rhetoric contains a humility that rings false: *"not unemployed"* by John Jacob Astor and *"not insensible"* to his good opinion. Explaining the allusion to John Jacob Astor, Mario D'Avanzo claims that the lawyer's proud identification with the "First Man of Wall Street" fits nicely into the theme of the story as a parable of the artist. Astor, he continues, exploited writers, particularly Washington Irving, so the great "patron" of art and founder of the library in which Melville read so many times epitomizes the pretentious society "which [...] has little use, need, or respect for a literature which dives to the philosophical deeps [...]".[15]James C. Wilson also connects the lawyer-narrator with Astor, concluding that in *Bartleby* Melville "by his use of aironic, self-justifying narrator in 'Bartleby,' succeeded in writing one of the bitterest indictments of American capitalism ever published."[16]

B. Lemuel Shaw

13 Keith Huntress, among others, has suggested Massachusetts Supreme Court Justice Lemuel Shaw, and his extreme pro-Federalist industrial expansion policies and their subsequent integration in his court decisions, as model for the lawyer-narrator in "Bartleby".[17] Shaw, Melville's father-in-law as well as lifelong benefactor, was seventy-two when "Bartleby"was first published, and he had been a successful lawyer and judge for nearly half a century. For Marcus, Bartleby "appears to the lawyer chiefly to remind him of the inadequacies, the sterile routine, of his world".[18] And one might well imagine parallels to the Shaw-Melville relationship. The lawyer in "Bartleby" prizes comfort, finding "the easiest way of life is the best" and thus abandoning the stress accompanying more ambitious legal practice. Robert Gale states: "In a way he [Shaw] too was unambitious, since in 1830 he had given up his opulent practice for the lesser-paying judgeship."[19] Further, his high pay as a lawyer had involved no turbulent addresses to juries but instead corporate work, which was indeed "very pleasantly remunerative."[20]

14 Through landmark rulings by Justice Shaw, workers--typically, railroad workers--came to be expected to "assume the risks" attached to their jobs, risks which in turn flowed from government incentives to unrestrained industrial growth. In other words, employers could not be held "accountable," in Shaw's own phrasing, for accidents incurred by workers on the job-hence denying workmen's compensation for any injuries sustained.[21] In *Farwell v. Boston. and Worcester Railroad,* Shaw held that employers are not liable for injuries that one worker negligently inflicts on another during the course of employment. [22] This decision, like many others he wrote, protected industry, and its value as legal precedent had much to do with the delay of Workmen's Compensation until 1910, when New York passed the first such act, declared unconstitutional by the Supreme Court in 1911,[23] and only after extended emendations, permitted by the Court in 1917.[24]

15 The theme of "accountability" occurs in a dialogue between the narrator and another lawyer, who accuses the narrator of shirking his responsibility for Bartleby's actions--effectively raising the Common Law doctrine of *Respondeat Superior* (charging the Master with responsibility for the actions of his Servant), which, incidentally, Shaw disavowed as controlling in *Farwell*, since the railroad was held not responsible for injuries inflicted by one employee on another:

> "Then, sir," said the stranger, who proved a lawyer, "you are responsible for the man you left there [...]" "I am very sorry, sir, " said I, with assumed tranquility, but an inward tremor, "but, really, the man you allude to is nothing to me—he is no relation or apprentice of mine, that you should hold me responsible for him." (66)

16 This second lawyer, less timid than the narrator, has Bartleby taken to the city jail, euphemistically called the Halls of Justice and more commonly known as the Tombs. James Wilson remarks that the lawyer-narrator had earlier likened Wall Street to Petra, "which was the ancient capital of Edom and famous for its Hellenistic tombs carved in rock. Thus the lawyer equates Wall Street with the jail: both are tombs."[25] The narrator has refused accountability--reasonably--yet recognizes the doctrine's moral implications with "an inward tremor."

17 Enunciated in *Farwell v. Boston and Worcester RR*, the doctrine of "assumption of risk" negating employer "accountability" was almost singularly responsible for a legal trend which made it incumbent on the injured party to prove that the harm could have been avoided--a very difficult and, more to the point, *costly* thing for the ordinary workingman to do and of undisputed advantage to business and industry. Corporate liability quickly came to be far reduced even as the lot of the average wage earner became more precarious--in terms of physical injury in the workspace as well as tragedies incurred through job loss during the economic panics of 1837 and 1857.

18 Shaw's "assumption" was scarcely original and can be traced to an English case, *Priestly v. Fowler* (1837), decided by Lord Abinger.[26] The suit was brought by a butcher's employee who had been hurt in the thigh when the butcher's van, overloaded, broke down. It had obviously little to do with industrial accidents as such, but later courts on both sides of the Atlantic picked up the rule in railroad cases. In a famous remark in the House of Commons in 1897, the secretary for Ireland stated: "Lord Abinger planted it, Baron Alderson watered it, and the devil gave it increase."[27] Sir Edward Hall Alderson was an English judge who further developed this doctrine. In the United States, meanwhile, one may substitute Justice Shaw for Alderson, "watering" the doctrine through 1842's *Farwell*, which was then to be cited as dispositive for 411 negligence cases.

19 In "Melville, Lemuel Shaw, and 'Bartleby'," John Stark has detailed Melville's frequent contacts with Shaw (particularly during the period Melville took up residence near Pittsfield, Massachusetts) and developed the thesis that their conversations would typically raise fairly specific accounts of their respective professional interests.[28] Stark surmises that Shaw probably took at least one of those opportunities to tellMelville about a related ruling Shaw rendered eight years later in *Brown v. Kendall.*[29] A standard text on torts (civil wrongs not involving a contract), for example, claims that it "is now considered the leading case establishing the necessity of proving negligence for the purpose of imposing liability for accidental injury." [30]

20 The plaintiff sued for injuries to his eye caused by a man who was wielding a stick in order to stop fight between two dogs owned by plaintiff and defendant respectively. Shaw ruled that Brown could not recover damages because Kendall was not absolutely liable for the injuries he caused and was not liable for the eye injury in particular because he was using ordinary care. The standard raised by Shaw was that of the "prudent" man in the ordinary exercise of his work or course of business. The idea of contributory negligence also arose from this case. Negligence on the part of a plaintiff in a case could seriously jeopardize any claims he may have against the defendant. Shaw then reaffirmed *Farwell* in stating that a person "takes upon himself the natural and ordinary risks and perils" of a job when he accepts employment. In *Brown*, both the trial judge and Shaw, writing for the Supreme Judicial Court, agreed that the defense of inevitable accident went to the adequacy of the defendant's care under the circumstances. Their difference was one of degree. The trial judge thought the issue was whether the defendant had exercised *extraordinary* care; [31]Justice Shaw saw the issue as one of ordinary care--defined as "that kind and degree of care, which prudent and cautious men would use [...] the increased degree of care and diligence, which the exigency of particular circumstances might require, and which men of ordinary care and prudence would use under like circumstances, to guard against danger." Defendants would be liable only if they are "chargeable with some fault, negligence, carelessness, or want of prudence."[32] Hence the fault standard became one of mere "prudence" or "reasonableness".

21 Stark aptly notes the frequent recurrence in both "Bartleby" and Shaw's opinion of the word "prudent"--"second in importance to 'prefer.'"[33] At the story's outset, the lawyer volunteers the following information. "Imprimis: I am a man who, from his youth upwards, has been filled with a profound conviction that the easiest way of life is the best" (p. 16). Content to "do a snug business among rich men's bonds, and mortgages, and title-deeds," he cherishes his "peace" above the usual "ambitions" and turbulence of his colleagues at law, who must go to court and face a jury and judge. His acquaintances consider him "safe" and the late John Jacob Astor, praised him above all for "prudence" and then "method." In this introduction to the narrator, the reader already encounters an interesting self-indictment in the linking of the terms "easiest" and "snug" with the normally more controlled and reflective stance implicit in the idea of "prudence."

22 In terms of the depiction of the lawyer-narrator in "Bartleby", the lawyer decides that "charity often operates as a vastly wise and prudent principle--a great safeguard to its possessor" (52). The lawyer seems here to have reconciled his prudential ethic with charity for Bartleby, but the final part of his statement indicates whose best interests his prudence serves. To him charity is a minor virtue, prudence the cardinal virtue, and he has trouble dealing with persons who do not accommodate themselves to his own prudent behavior. In short, Shaw's opinion in Brown v. Kendall extols prudence *but*

Melville's "Bartleby", "by showing the prudent lawyer's ineffective reaction to his scrivener, exposes its flaws and limits."[34]

23 On its face Brown v. Kendall appears far removed from more abstract policy considerations bearing on nineteenth century American economic jurisprudence. But the connection is linked to the purpose, evident throughout his judicial career, to encourage developing industries and businesses. Shaw had propounded the most important rules of the common law involving railroads, as in *Farwell*, for example, and almost always decided in their favor by limiting their liability. Lawrence Friedman--noting the development of railroads in terms of their benefits in linking cities and tying farms to the city and the seaports--also describes trains as "wild beasts" roaring through the countryside "killing livestock, setting fire to crops, smashing passengers and freight." In his analysis, railroad law and tort law grew up together and "the two were the same" in a sense:

> Every legal system tries to redress harm done by one person to another. The industrial revolution added an appalling increase in dimension. Its machines produced injuries as well as profits and products. The profits were a tempting and logical fund out of which to pay the costs of the injured. Moreover, the industrial relationship was impersonal. No ties of blood or love prevented one cog in the machine from suing the machine and its owners. But precisely here (to the 19th century mine) lay the danger. Lawsuits and damages might injure the health of precarious enterprise. The machines were the basis for economic growth, for national wealth, for the greater of good of society.[35]

24 Thus, by announcing in *Brown v. Kendall* that the plaintiff could only have won by proving that the defendant used less than ordinary care, Shaw established that rule for hundreds of cases and thereby made it more difficult for persons to win suits against businesses that had injured them. Having to pay less money for legal damages, businesses could invest more in expansion --all in the name of the general interest for society as a whole.

25 Shaw's concern over general policies of social governance extended to criminal law as well. In *Commonwealth v. Mash*, Shaw generated a rationale for a bigamy conviction against a woman who sincerely regarded her absent husband as dead.[36] Shaw tacitly conceded that Mrs. Mash was not blameworthy for entering into the second marriage. Yet that mattered little, he argued, for preventing bigamy was "essential to the peace of families and the good order of society..."[37] Thus in Shaw's mind, the social interest in deterring bigamy justified convicting a morally innocent woman. In the words of Prof. George Fletcher: "If a judge is inclined to sacrifice morally innocent offenders for the sake of social control he is also likely to require the victims of socially useful activities to bear their injuries without compensation."[38]

26 Neither was the issue of slavery spared Shaw's unflinching devotion to broad policy consideration. Shaw freed slaves who were not runaways, because Massachusetts had no law establishing slavery. He decided these cases in accordance with his opposition to slavery, which he made public as early as 1820. However, he enforced the Fugitive Slave Law by returning to their masters all the runaway slaves who appeared before him.[39] The rationale was a perceived need for absolute social control under the guise of "law and order". In a more significant case on racial issues, Roberts v. City of Boston, Shaw upheld the practice of segregation in the Boston school system.[40] This case is important because, according to the opinion in the 1954 Brown v. Board of Education of Topeka, Kansas which overturned Roberts, the long-standing doctrine of "separate but equal"--normally attributed to the 1896 Supreme Court decision in *Plessy v. Ferguson*[41]--apparently

originated in Roberts v. City of Boston."[42] *Once more, to Shaw's way of thinking, a well-ordered society of "prudent" individuals requires strata which must be faithfully adhered to.*

C. Res ipsa loquitur

27 Under the legal doctrine of *res ipsa loquitur*, the occurrence of an injury implies that the harm could have been avoided if ordinary care had been used--by extension, blame shifts in such a way as to diminish concern for social and economic exigencies and takes into account the victimized individual. Melville's richly evocative themes of existence and alienation apart, "Bartleby" also seems to represent an argument of this sort, meant to counter Shaw's prevailing, and cruel, legal fiction of the day. *Res ipsa loquitur* raises a presumption of negligence (a strict liability) on the part of the person who caused the harm and who now bears the burden of proving the act was exercised with appropriate care. Where unequal access to direct evidence of negligence burdens the plaintiff, as was the case with the ordinary railroad worker, this doctrine may be used to bring the case to the jury with an inference of negligence. The doctrine of *res ipsa loquitur* could thus provide aid to the victimized who was being compelled to "assume the risk" daily physical sustenance entailed.

28 This doctrine was itself scarcely new, stemming as it did from medieval English Common Law. It involved legal notions such as strict liability in trespass actions, dating back to twelfth century England and articulated in *Weaver v. Ward*, a 1616 case involving the accidental discharge of firearms--establishing the danger inherent in weapons as requiring special care in their use, and any ensuing "accidents" thus forming a *prima facia* case for tortious negligence.[43] Morton J. Horwitz--citing various American cases circa 1800 where strict liability was still in force--argues that later nineteenth century tort doctrine--such as that developed by Lemuel Shaw--was hence "deliberately structured to accommodate the economic interests of emerging industry."[44]

29 Although "Bartleby"'s potential as allusive to the severity of the "assumption of risk" doctrine has been ably handled by Michael Rogin,[45] Brook Thomas,[46] Gillian Brown,[47] and notably, Cindy Weinstein in her fine article entitled "Melville, Labor, and the Discourses of Reception,"[48] this article proposes the ancient "it speaks for itself" legal notion as thinly veiled in the scrivener's obdurate refusal to explain, justify or even excuse his behavior. And as such, it imputes to Melville knowledge of the common law tradition prior to Shaw's reversal, and anticipates current theories of strict liability which, despite pressures from unions and social critics, did not receive Supreme Court approval before 1917.

30 In "Bartleby", therefore, the moral bind the lawyer-narrator finds himself in entails precisely that opposition between an affirmative duty to help a person in distress and the prevailing convention imputing to everyone a supposed "freedom" to enter into contractual employment relations, thereby assuming all attendant job-related risks, or not--which in that epoch, translated into the "freedom" to be unemployed and to starve. The lawyer's attempts at making accommodations fall generally within the context of prevailing professional standards of composure and dignity, which militate against the "prudence" of compassion. The lawyer consoles himself by readings of theologian Jonathan Edwards and scientist Joseph Priestly ("Edwards on the Will" and "Priestly on Necessity")--both having denied the doctrine of free will and encouraging the notion that history was pre-ordained.[49] Again, a prudent shelving of any need to reflect more deeply

on Bartleby's condition since, whether the product of choice or destiny, the repercussions of Bartleby's actions, in keeping with these principles, would reside beyond the professional interests or duty of the lawyer.

31 Referring to Bartleby's repeated "preferences" (phrased generally as: "I would prefer not to,") along with his final statement on his condition in the Tombs: "I know where I am"(72), Liane Norman proposes that what Bartleby is really saying is: "I know your freedom and prosperity and I want nothing to do with them. They did not permit me to choose."[50] In this case, Bartleby has not exercised a free choice against "your freedom and prosperity" as much as expressed the awareness that he may never know freedom or prosperity because of the obstacles placed by society--which the community justifies in terms of imputing to its members the "assumption of risk" associated with the workaday world. The "freedom" alluded to is that very double-edged "freedom of contract" flowing from the "assumption of risk" suffusing Shaw's rulings. And the scrivener's unwillingness to elaborate on justifications for his conduct amount to the equivalent of "Open your eyes--the thing speaks for itself." An exchange between narrator and scrivener reveals Bartleby's impatience with the absurdity of such interrogations: "And what is the reason?" asks the lawyer when Bartleby reveals his "preference" to stop all work entirely. "Do you not see the reason for yourself?" the scrivener answers (52). And as the reader knows, the lawyer does not, can not "see the reason." In fact, in keeping with the professional standards of the day and correlate dictates of "prudence" informing the ethics of legal practice, he *ought* not.

D. Shaw's "still more unfortunate Colt"

32 About two-thirds of the way along in the tale, Melville introduces an extended allusion to the Colt-Adams murder case--explicable possibly in terms Melville was particularly privy. Commonwealth v. Roger came down in 1844, one year after the famous English *M'Naghten* Rule, which holds that the defense proves insanity and thus avoids criminal liability if it can show that the alleged criminal did not know the nature and quality of his or her act.[51] Stark describes the *M'Naghten* Rule as the dominant conception of legal insanity until well into the twentieth century, when the Durham Rule (mental illness is the test of insanity) superseded it. This doctrine propounds a purely rational test: insanity is a lack of knowledge. In contrast, Shaw's opinion in *Roger* proposed a volitional test because he defined insanity as victimization by an irresistible impulse, a definition that some later courts adopted. In 1850, six years later, Shaw held in Commonwealth v. Webster that if the state in a murder trial proves intent beyond a reasonable doubt and the defense proves no extenuating circumstances (an excuse or justification that would show innocence or reduce a charge from murder to manslaughter), the malice necessary to establish murder is shown as a matter of law (that is, the court will so mandate the jury's decision).[52]Intent thus came to be virtually equivalent to the "malice aforethought" that had for some time been the mens rea (mental element) that along with an actus reus (act) and a causal connection to the death constituted murder.

33 This rule ostensibly made the defendant's task very difficult--precisely because it entails an assumption: an assumption of "intent to do harm" on the part of the defendant. One need only keep in mind the collateral absence of such an assumption (and a corresponding shifting of the burden of proof to the *plaintiff*) in the industry-related "assumption of risk" doctrine, to note the inconsistency--as well as the obvious prejudice

vis-à-vis the financial capabilities of the plaintiff/defendant: in a railroad case, a plaintiff must already be wealthy to recover damages from the company--since he/she bears the burden of proving negligence; the defendant in a murder case, on the other hand, *if sufficiently of means*, can *avoid* the presumption of guilt by establishing "excuse" or "justification."[53] In other words, as in cases involving railroad companies, the wealthy would emerge unscathed.

34 The Colt-Adams murder case had caused a sensation in 1841 and 1842--not incidentally, prior to Shaw's landmark ruling in *Rogers*. The lurid aspects of the crime itself, the unusual publicity provided by the emerging sensational press, doubts about the justice of the decision to hang Colt, and the curious denouement which substituted suicide by knife for the hangman's noose, combined to make an impression which lingered in the minds of some for many decades after the event. In 1841, an attorney named John C. Colt was accused of having bludgeoned Samuel Adams to death with a hatchet in his own Broadway office. Adams, whose corpse was later found crated to be shipped to New Orleans, was a printer who had come to Colt to collect a debt. The body was discovered, and the ensuing trial, conviction, sentencing, execution, etc. produced an almost unprecedented sensation. The New York Daily Tribune printed a daily account of trial proceedings, including a graphic confession written by Colt and read to the court by his attorney. Colt was found dead, apparently a suicide, shortly before his scheduled execution.

35 There exist differing versions of the event. According to diarist George Templeton Strong: "The possibilities of premeditation, accidental slaying in the heat of quarrel, and self-defense were debated in the course of the trial. The fact of Colt's killing Adams was not, except at the very outset, in question."[54] The *United States Magazine and Democratic Review* took a more sympathetic position: "Colt's version of the affair ascribed the bruised marks on his neck, to Adams's throttling clutch in their encounter; and he denied having personally assisted in carrying down the stairs the box which was heavy with those hideous contents [...]" Apparently testimony to this effect was available at the outset of trial, but owing to the prevailing rules of evidence was regarded as immaterial:

> In the first place, is the offered testimony of a witness of unimpeachable respectability, going to sustain Colt's statement on a point on which it was contradicted, and which became one of not immaterial moment during the course of the trial, although its importance was not perceived in its earlier stage, by the counsel who rejected it as unnecessary, and thus caused the witness to absent himself from the city [...] The materiality of the point in question may be a matter for difference of opinion. It is certain that, directly or indirectly, it told very hard against him at the time of the trial.[55]

36 The narrator sees Colt as more unfortunate than the murdered Adams--the irony arising possibly from the fact that had Shaw presided, his reformulation of the burden of proving Colt's guilt might have resulted in an acquittal. Gale suggests that when Melville alluded to the murder of Adams by Colt he may also have had in mind two other murders: the killing in self-defense of Charles Austin in 1806 by Thomas O. Selfridge, a law-partner of Shaw's, and the famous murder of George Parkman by Harvard chemistry professor John W. Webster, who was tried in 1850 before the Supreme Judicial Court of Massachusetts presided over by Judge Shaw.[56] Parkman had been dismembered and in the absence of a clear *corpus delicti* --for the physical identification of the headless corpse of George Parkman rested on dubious legal grounds--the prosecution directed attention to the black and shaded portions of the skeletal pieces that were found. Prof. Halttunen maintains

that the tentative quality of the evidence rendered the jury's decision, in addition to the entire conduct of the trial, as publicly questionable and prompted a number of specific legal challenges to Chief Justice Lemuel Shaw's "treatment of burden of proof concerning *corpus delicti*, his presentation of the law of circumstantial evidence, and the extreme bias of his summation of evidence in his charge to the jury."[57]

37 After Webster had been sentenced to die for his crime, he wrote a confession which acknowledged that he had killed Parkman but claimed that he had done so in a burst of anger, without premeditation; he was guilty, in other words, not of first-degree murder but of manslaughter. Hundreds of letters to the governor pleaded for a reprieve, but he ignored them, and Webster was duly executed. And here, one can imagine Shaw's consternation over the belated confession, the elements of which would have, in his rationale, sufficed to charge the jury to weigh the evidence differently (as per *Webster* and *Roger*), thereby sparing the defendant's life--which would have been consistent with Shaw's general policies favoring the upper classes (in this case, a Harvard Professor).

38 Melville understood Shaw and his own financial dependence on him, as well as the unutterable truths implicit in their conflicting paradigms of dignity and discipline. Certainly, for his day, Shaw was a paragon of judicial virtue--provided one did not question the political and economic presuppositions informing that particular era. Upon close examination and due reflection, Melville's genius penetrated this harsh reality and revealed itself to be inconsolably bound both to the exigencies of the quotidian as well as to the dignity and discipline so integral to the work of an artist. The sole compromise turning on the wish not to state the obvious, *res ipsa loquitur*, or not to speak at all--presaging the near total absence of literary output which was to mark the second half of Melville's life:

> "Bartleby!"
> "I know you," he said, without looking round--"and I want nothing to say to you."
> "It was not I that brought you here, Bartleby," said I, keenly pained at his implied suspicion. "And to you, this should not be so vile a place. Nothing reproachful attaches to you by being here. And see, it is not so sad a place as one might think. Look, there is the sky, and here is the grass."
> "I know where I am." (72)

NOTES

1. "Misgivings" from *Battle-Pieces* and *Aspects of War*, 1860, Herman Melville, *Collected Poems of Herman Melville*. Ed. Howard P.Vincent. Chicago: Richard and Company, 1947.

2. Herman Melville, *Bartleby the Scrivener: A Story of Wall Street*, (orig. pub., 1853) All references are to the New York: Simon &Schuster CommonPlace Edition, 1997.

3. Jay Leyda, The Melville Log: A Documentary Life of Herman Melville *1819-1891* New York 1951, I. 482

4. Daniel A Wells,. "'Bartleby the Scrivener,' Poe, and the Duyckinck Circle" ESQ, 21(1975), 35-39.

5. Lewis Mumford, Herman Melville: A Study of His Life and Vision, New York: *Harcourt, Brace, and World,* 1929. 229

6. Mumford. 238

7. Nicholas Ayo "Bartleby's Lawyer On Trial," *Arizona Quarterly* 28 (1972), 27-38.

8. David Dudley Field, "The Laws and Lawyers of New York," Titus Munson Coan, Editor. *Speeches, Arguments And Miscellaneous Papers Of David Dudley Field*. Volume Iii. (New York: D. Appleton And Company, 1, 3, And 5 Bond Street, 1890). "The Laws And Lawyers Of New York" Address delivered at Buffalo, October 13, 1886.

9. Sculley Bradley, *The American Tradition in Literature*, ed. Sculley Bradley, R. C. Beatty, and E. H. Long, Revised (New York: W. W. Norton Co., 1961), I, 962.

10. Leo Marx , "Melville's Parable of the Walls," *Sewanee Review*, 61 (1953), 626.

11. Thomas Shearman, "The Judiciary of New York," 105 *North American Review*, July 1867. 148-176.

12. Since the Judicature Act of 1873, it has become a division of the High Court of Justice.

13. Astor (1763-1848) began as a poor German immigrant to the United States, only to become immensely successful in fur trading and real estate, and the richest man of his time. However, his name was synonymous with the worst abuses of big business: monopoly, worker exploitation, and political corruption. At his death, Astor's estate was worth more than $340 million in today's terms.

14. Kenneth Wiggins Porter, *John Jacob Astor: Business Man*, Cambridge, Mass.: Harvard Univ.Press, 1931. II, 930-31.

15. Mario D'Avanzo, "Melville's 'Bartleby' and John Jacob Astor," *The New England Quarterly*,41 (1968). 261.

16. James C. Wilson, "'Bartleby': The Walls of Wall Street," *Arizona Quarterly*, 37 (1981). 335-46.

17. Keith Huntress, " 'Guinea'of *White-Jacket* and Chief Justice Shaw," *American Literature*, 43 (January 1972), 639-641.

18. Mordecai Marcus, "Melville's Bartleby as a Psychological Double," 366

19. Robert L. Gale, "Bartleby—Melville's Father-in-Law", University of Pittsburg, http://bartleby.com/br/129.html

20. Leonard W. Levy, *The Law of the Commonwealth and Chief Justice Shaw* Boston: Cambridge UP, 1957. 218-228

21. Leonard Levy, *The Law of the Commonwealth and Chief Justice Shaw*, Cambridge: Harvard UP, 1957. 176

22. *Farwell v. Bost. and Worcester Railroad* 4 Metc. 49 (1842)

23. *Ives v. South Buffalo Ry*., 201 NY271, 94 N.E. 431 (1911)

24. *New York Central R.R. v. White*, 243 U.S. 188 (1917)

25. James C. Wilson, "'Bartleby': The Walls Of Wall Street," *Arizona Quarterly* 37 (Winter 1981), 335-46.

26. *Priestly v. Fowler*, 3 M. & W. 1 (1837)

27. Quoted in Walter F. Dodd, *Administration of Workmen's Compensation*, London, 1936. 5, n. 7.

28. John Stark; "Melville, Lemuel Shaw, and Bartleby" M. Thomas Inge, ed., *Bartleby The Inscrutable*, Hamden, CT:Archon Books, 1979. 166-73.

29. *Brown v. Kendall* 60 Mass. 292 (1850)

30. James A. Henderson, Jr., and Richard N. Pearson, *The Torts Process*, Boston: Little, Brown and Company, 1975. 270.

31. *id.* 293

32. *id.* At 296

33. John Stark. 170

34. John Stark. 166-73.

35. Lawrence M. Friedman, *A History of American Law*, 1973. 410

36. *Commonwealth v. Mash*, 48 Mass. (7 Met.) 472 (1844)

37. *id*. 473

38. George P. Fletcher, "Fairness and Futility in Tort Theory," *Harvard Law Review*, vol. 85, No. 3, (Jan. 1972).567

39. For example: *Latimer's Case*, 5 Law Rep. 483 (1843).

40. *Roberts v. City of Boston* 5 Cush. 198 (1849)

41. *Plessy v. Fergusson* 163 U.S. 537 (1896)

42. *Brown v. Board of Education of Topeka* 347 U.S. 483 (1954).

43. *Weaver v. Ward*, Hobart, 134, 80 Eng. Rep. 284 (1616

44. Morton J. Horwitrz, *The Transformation of American Law*, 1780-1860, Boston : Harvard UP, 1977. 63-108, 289-307

45. Michael Rogin, Subversive Genealogy: *The Politics and Art of Herman Melville*, New York : Knopf, 1983

46. Brook Thomas, *Cross-examinationsof Law and Literature: Cooper, Hawthorne, Stowe, andMelville*, Cambridge : Cambridge UP, 1987

47. Gillian Brown, *Domestic Individualism: Imagining Self in Nineteenth-Century America*, Berkeley : U of California P, 1990

48. In the *Cambridge Companion to Herman Melville*, Robert S. Levine, ed., Cambridge : Cambridge UP, 1998, 202-223

49. Note the use of "preference" in Edwards' : "in every voliton there is a preference, or a prevailing inclination of the soul" Jonathan Edwards, *Freedom of the Will*, ed. Paul Ramsey, New Haven : Yale U P, 1957. 140

50. Liane Norman "Bartleby and the Reader," *New England Quarterly* 44 [1971] : 38.

51. *Commonwealth v. Roger* 7 Metc. 500 (1844)

52. *Commonwealth v. Webster* 5 Cush. 295 (1850)

53. A contemporary example being the O.J. Simpson case where, although the theory in question was different, the available financial resources at the defendant's disposal undoubtedly aided in developing trial tactics.

54. George Templeton Strong was elected a trustee of Columbia College in 1853. He soon became actively engaged in the development of the Law School. A posthumously noted diarist, he was out of the city at the time of the murder, but he gave a great deal of attention to the trial and its aftermath. In 1857 and again over thirty years after the murder, he used the case as a point of comparison in referring to the excitement and interest aroused by latter-day New York City crimes. (See *The Diary of George Templeton Strong*, ed. Allan Nevins and Milton Halsey Thomas [New York, 1952], I, 168, 189-93; IV, 472.)

55. "Colt's Case," *United States Magazine and Democratic Review* 11 (1842). 651-55. As historical footnote, this journal is where the expression "manifest destiny" first came to use in John O'Sullivan's 1845 article encouraging the invasion and annexation of Mexico.

56. Frederic Hathaway Chase, *Lemuel Shaw: Chief Justice of the Supreme Judicial Court of Massachusetts 1830-1860*, Boston: Macmillan, 1918.. 51-53, 188-210

57. Karen Halttunen, "Divine Providence and Dr. Parkman's Jawbone: The Cultural Construction of Murder as Mystery" Revised: September 1996 Ideas, National Humanities Center URL: http://www.nhc.rtp.nc.us:8080

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